Badan Peguam Malaysia v Lembaga Pengampunan Wilayah-Wilayah Persekutuan Kuala Lumpur, Labuan and Putrajaya & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO WA-25-192–04 TAHUN 2024
AHMAD KAMAL J
16 DECEMBER 2024

Administrative Law — Judicial review — Application for leave — Royal prerogative of mercy of Yang di-Pertuan Agong ('YDPA') — Applicant applied for leave to commence judicial review against first respondent's decisions in advising YDPA regarding granting of pardon to second respondent — Whether application justiciable to judicial review

The applicant was the Malaysian Bar, a corporate body established under and governed by the Legal Profession Act 1976. The first respondent was the Pardons Board for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. Meetings of the first respondent were held in the presence of the Yang Di-Pertuan Agong ('YDPA'), who presided over it. The second respondent was the sixth Prime Minister of Malaysia, holding office from 3 April 2009 to 9 May 2018. The second respondent was charged for, inter alia, abuse of power, criminal breach of trust and money laundering involving SRC International Sdn Bhd, relating to RM42m ('the *SRC* case'). The second respondent was found guilty by the High Court of all charges in the *SRC* case and was sentenced to a total of 72 years imprisonment and a fine of RM210m. Since the imprisonment sentences were to run concurrently, the second respondent was only required to serve 12 years. The Court of Appeal and the Federal Court upheld the High Court's judgment in the *SRC* case and dismissed the second respondent's appeals. The second respondent began serving his imprisonment sentence on 23 August 2022 but had not paid the RM210m fine or any part of it so far. At its 61st meeting, the first respondent decided to advise the YDPA to reduce the second respondent's: (a) imprisonment sentence by 50%, whereby he would be granted an early release namely on 23 August 2028; and (b) RM210m fine to RM50m, with the condition that if he fails to pay the reduced fine, his prison term would be extended by a year, whereby his early release date would fall on 23 August 2029 ('the decisions'). Hence, this application by the applicant that leave be granted to apply for a judicial review. The applicant sought, inter alia, for: (i) a declaration that the decisions made by the first respondent were unlawful, unconstitutional and void; and (ii) an order of certiorari against the first respondent to quash the decisions.

Held, dismissing the application:

(1) The relief sought by the applicant was directed at challenging the power of mercy ie royal prerogative of mercy of the YDPA which was expressly preserved by art 42 of the Federal Constitution ('the FC'). Prerogative of mercy pursuant to Art 42 was the direct exercise of the YDPA's sole discretion and not the first respondent or power delegated to the first respondent. The prerogative of mercy was not susceptible to judicial review. Hence, the reliefs sought to challenge the decision of the first respondent were by its nature and subject matter, not justiciable to judicial review (see paras 85 & 90–91).

(2) The applicant's attempt to differentiate between challenging the advice of the first respondent and the actual decision of the YDPA was flawed, it was non-challengeable. The decision of the YDPA and the advice of the first respondent were all part and parcel of one process that culminated in the granting of pardon by the YDPA, consequently not a matter that was suitable and appropriate to be reviewed before the court. Further, the reliance to art 40(1A) of the FC to support the applicant's contention that this application was justiciable was devoid of merit as art 40(1A) of the FC only applied in the situation when it was provided under the Constitution or the Federal laws that the YDPA was to act on the advice. Reading art 40(2) together with art 42 of the FC, it was clear that the power of pardon was a decision specifically entrusted to the sole discretion of YDPA. The final and conclusive determination rest with the YDPA and not the first respondent. Therefore, if the decision of YDPA to grant pardon was not susceptible to judicial review, it followed that the process leading to it was also not susceptible to judicial review (see paras 93, 97, 104 & 106).

[Bahasa Malaysia summary

Pemohon adalah Badan Peguam Malaysia, sebuah badan korporat yang ditubuhkan di bawah dan dikawal selia oleh Akta Profesion Undang-Undang 1976. Responden pertama ialah Lembaga Pengampunan bagi Wilayah Persekutuan Kuala Lumpur, Labuan dan Putrajaya. Mesyuarat responden pertama diadakan di hadapan Yang Di-Pertuan Agong ('YDPA') yang mempengerusikan mesyuarat tersebut. Responden kedua ialah Perdana Menteri Malaysia yang ke-6, yang memegang jawatan dari 3 April 2009 hingga 9 Mei 2018. Responden kedua didakwa, antara lain, penyalahgunaan kuasa, pecah amanah jenayah dan pengubahan wang haram yang melibatkan SRC International Sdn Bhd, berkaitan RM42 juta ('kes *SRC*'). Responden kedua didapati bersalah oleh Mahkamah Tinggi atas semua tuduhan dalam kes *SRC* dan dijatuhkan hukuman penjara sebanyak 72 tahun dan denda sebanyak RM210 juta. Oleh kerana hukuman penjara dijalankan serentak, responden kedua hanya perlu menjalani 12 tahun penjara. Mahkamah Rayuan dan Mahkamah Persekutuan mengekalkan keputusan Mahkamah Tinggi dalam

kes *SRC* dan menolak rayuan responden kedua. Responden kedua mula menjalani hukuman penjara pada 23 Ogos 2022 tetapi sehingga kini belum membayar denda RM210 juta atau sebahagiannya. Pada mesyuarat kali ke-61, responden pertama memutuskan untuk menasihati YDPA supaya mengurangkan: (a) hukuman penjara responden kedua sebanyak 50%, di mana beliau akan dibebaskan awal iaitu pada 23 Ogos 2028; dan (b) denda RM210 juta kepada RM50 juta, dengan syarat jika beliau gagal membayar denda yang dikurangkan tersebut, tempoh penjaranya akan dilanjutkan selama satu tahun, di mana tarikh pembebasan awalnya akan jatuh pada 23 Ogos 2029 ('keputusan'). Oleh yang demikian, permohonan ini dibuat oleh pemohon supaya diberikan kebenaran untuk memohon semakan kehakiman. Pemohon memohon, antara lain, untuk: (i) pengisytiharan bahawa keputusan yang dibuat oleh responden pertama adalah tidak sah, tidak berperlembagaan dan batal; dan (ii) perintah certiorari terhadap responden pertama untuk membatalkan keputusan tersebut.

Diputuskan, mengesahkan sabitan dan hukuman oleh mahkamah sesyen:

(1) Relief yang dipohon oleh pemohon ditujukan untuk mencabar kuasa pengampunan iaitu kuasa pengampunan diraja YDPA yang secara tegas dipelihara oleh perkara 42 Perlembagaan Persekutuan ('PP'). Kuasa pengampunan menurut Perkara 42 merupakan pelaksanaan langsung kuasa mutlak YDPA dan bukan kuasa responden pertama atau kuasa yang diberi kepada responden pertama. Kuasa pengampunan tidak terbuka kepada semakan kehakiman. Oleh itu, relief yang dipohon untuk mencabar keputusan responden pertama adalah oleh sifat dan perkara yang berkaitan, tidak terbuka kepada semakan kehakiman (lihat perenggan 85 & 90–91).

(2) Percubaan pemohon untuk membezakan antara mencabar nasihat responden pertama dan keputusan sebenar YDPA adalah salah, kerana ia tidak boleh dicabar. Keputusan YDPA dan nasihat responden pertama semua adalah sebahagian daripada satu proses yang berakhir dengan pemberian pengampunan oleh YDPA, maka bukan perkara yang sesuai dan layak untuk disemak di mahkamah. Selanjutnya, pergantungan kepada perkara 40(1A) PP untuk menyokong hujah pemohon bahawa permohonan ini terbuka kepada semakan kehakiman adalah tidak berasas kerana perkara 40(1A) PP hanya terpakai apabila dinyatakan di bawah Perlembagaan atau undang-undang Persekutuan bahawa YDPA hendaklah bertindak berdasarkan nasihat. Membaca perkara 40(2) bersama-sama dengan perkara 42 PP, jelas bahawa kuasa pengampunan adalah keputusan yang secara khusus diamanahkan kepada kuasa mutlak YDPA. Keputusan terakhir dan muktamad terletak di tangan YDPA dan bukan responden pertama. Oleh itu, jika keputusan YDPA untuk memberi pengampunan tidak terbuka kepada semakan kehakiman, maka proses yang membawa kepada keputusan tersebut juga tidak

terbuka kepada semakan kehakiman (lihat perenggan 93, 97, 104 & 106).]

Cases referred to

Dato' Sri Mohd Najib bin Tun Hj Abdul Razak v Peguam Negara & Ors [2020] 3 MLJ 114; [2020] 2 CLJ 73; [2020] 1 MLRA 583, CA (refd)

Datuk Seri Anwar Ibrahim v Mohd Khairul Azam Abdul Aziz and another appeal [2023] 2 MLJ 545; [2023] 3 MLRA 149; [2023] 2 CLJ 236, CA (refd)

Juraimi bin Husin v Pardons Board, State of Pahang & Ors [2002] 4 MLJ 529; [2002] 2 MLRA 121; [2002] 4 CLJ 529; [2002] 4 AMR 4785, FC (refd)

Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443; [2019] 3 MLRA 183; [2019] 4 CLJ 561; [2019] 3 AMR 625, FC (refd)

Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385; [1985] 1 MLRA 167; [1985] CLJ Rep 293, SC (refd)

Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494; [1986] 1 MLRA 131; [1986] CLJ Rep 256, SC (refd)

Tan Sri Musa bin Hj Aman & Ors v Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors [2021] 3 MLJ 329; [2021] 3 MLRA 503, CA (refd)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2005] 2 MLRA 698; [2006] 1 CLJ 927, CA (refd)

Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors [2011] 1 MLJ 128; [2010] 11 MLRH 277, HC (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478; [2012] 4 MLRA 257, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 4

Courts of Judicature Act 1964 s 84

Federal Constitution arts 5(1), 8(1), (2), 40(1A), (2), 42, 42(1), (4)(b), (8), (11), 11th Schedule, s 38

Laws of the Constitution of Kelantan art VII

Laws of the Constitution of Pahang art 15

Legal Profession Act 1976 ss 42, 64

Malaysian Anti-Corruption Commission Act 2009 ss 23, 24

Penal Code s 409

Rules of Court 2012 O 53 r 3

Rules of the Federal Court 1995 r 137

Rules of the High Court 1980 (repealed by the Rules of Court 2012) O 18 r 19

Zainur Zakaria (with Yeo Yang Poh and Rajpal Singh Ghai) (Amir & Rajpal Singh) for the applicant.
Ahmad Hanir bin Hambaly @ Arwi (with Imtiyaz Wizni Aufa bt Othman) (Federal Counsel, Attorney General's Chambers) for the first respondent.
Muhammad Shafee Abdullah (with Muhammad Farhan Shafee and Wan Mohammad Arfan Wan Othman) (Shafee & Co) for the second respondent.

Ahmad Kamal J:

INTRODUCTION

[1] The applicant had filed an application that leave be granted to the applicant under O 53 r 3 of the Rules of Court 2012 ('the ROC') to apply for a judicial review (encl 1).

[2] The applicant seeks the following reliefs:

(a) a declaration that the decisions made by the first respondent on 29 January 2024 regarding the application by the second respondent, Datuk Seri Mohd Najib bin Tun Haji Abdul Razak ('Najib'):

(i) to reduce Najib's imprisonment sentence by 50%, whereby he would be granted an early release, namely on 23 August 2028; and

(ii) to reduce Najib's RM210m fine to RM50m, with the condition that if he fails to pay the reduced fine, his prison term would be extended by a year, whereby his early release date will fall on 23 August 2029;
(collectively 'decisions') are unlawful, unconstitutional and void.

(b) an order of certiorari against the first respondent to quash the decisions;

(c) a permanent injunction restraining the second respondent, his servants, agents, or otherwise howsoever, from submitting any application for pardon, reprieve or respite, to the first respondent, until and unless:

(i) all criminal prosecutions or charges against him have been exhausted;

(ii) he has publicly accepted responsibility for his actions for which he is convicted; and

(iii) he has expressed repentance and remorse for those actions.

(d) an order of prohibition directed against the first respondent from accepting, considering, or determining any application by the second respondent for pardon, reprieve, or respite, until and unless:

(i) all criminal prosecutions or charges against him have been exhausted;

(ii) he has publicly accepted responsibility for his actions for which he was convicted; and

(iii) he has expressed repentance and remorse for his actions.

(e) such further order or relief as this honourable court deems fit; and

(f) with no order as to costs.

[3] After the hearing, I dismissed the applicant's application in encl 1. The grounds for my decision appear below.

BACKGROUND FACTS

[4] The background facts of this case are largely undisputed and are adopted with and/or without modifications from the statement and the applicant's affidavit in support and can be summarised as follows:

Parties

[5] The applicant is the Malaysian Bar, a corporate body established under and governed by the Legal Profession Act 1976 ('the LPA'). Pursuant to s 42 of the LPA, the Malaysian Bar's objects and purposes include:

(a) to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour; and

(b) to protect and assist the public in all matters touching, ancillary or incidental to the law.

[6] The first respondent is the Pardons Board for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya ('FT Pardons Board'). The FT Pardons Board is a body established under art 42(11) of the Federal Constitution ('the FC'). Meetings of the FT Pardons Board are held in the presence of the Yang Di-Pertuan Agong ('YDPA'), who presides over it. It comprises five members.

[7] The FT Pardons Board is constitutionally entrusted with the duty of considering applications for pardons for persons convicted by a final court of law. The FT Pardons Board is constitutionally to empowered to advise the YDPA to 'grant pardons, reprieves and respites' in appropriate circumstances and to deserving applicants.

[8] The second respondent, Najib, was the sixth Prime Minister of Malaysia, holding office from 3 April 2009 to 9 May 2018.

Relief

[9] On 29 January 2024, at its 61st meeting, the FT Pardons Board decided to advise the YDPA:

(a) to reduce Najib's imprisonment sentence by 50%, whereby he would be granted an early release, namely on 23 August 2028; and

(b) to reduce Najib's RM210m fine to RM50m, with the condition that if he fails to pay the reduced fine, his prison term would be extended by a year, whereby his early release date will fall on 23 August 2029.

(collectively 'decisions'). The FT Pardons Board's decisions were announced publicly on 2 February 2024, by way of a media release.

Criminal charges and proceedings against Najib

[10] After Najib was defeated in the 14th General Elections in May 2018, and he vacated the office of Prime Minister in May 2018, he was charged on five separate occasions relating to five different sets of charges:

(a) in July and August 2018, one charge for abuse of power, three charges for criminal breach of trust, and three charges for money laundering involving SRC International Sdn Bhd (a subsidiary of 1 Malaysia Development Berhad ('1MDB')) relating to RM42m ('*SRC* case');

(b) in September 2018, 21 charges for money laundering and four charges for abuse of power in relation to 1 Malaysia Development Berhad relating to USD681m ('*Tanore* case'); and

(c) in October 2018, six charges for criminal breach of trust in respect of International Petroleum Investment Company ('*IPIC* case');

SRC case

[11] The seven charges in the *SRC* case relate to Najib's misappropriation of public funds, amounting to RM42m, from loans given by Kumpulan Wang Persaraan (Diperbadankan) ('KWAP') to SRC International Sdn Bhd.

[12] On 28 July 2020, Najib was found guilty by the High Court of Kuala Lumpur of all seven charges in the *SRC* case, and was sentenced as follows:

(a) for the single charge under s 23 of the Malaysian Anti-Corruption Commission Act 2009 for abuse of position for gratification — imprisonment for 12 years and a fine of RM210m (which is mandatory by law) (in default thereof, five years imprisonment);

(b) for each of the three charges under s 409 of the Penal Code for criminal breach of trust — imprisonment for ten years; and

(c) for each of the three money laundering charges under s 4 of the

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 — imprisonment for ten years.

The imprisonment sentences are to run concurrently. Thus, while Najib was sentenced to a total of 72 years of imprisonment, he would only be required under the law to serve 12 years.

[13] On 8 December 2021, the Court of Appeal upheld the High Court's judgment in the *SRC* case and dismissed Najib's appeal.

[14] On 23 August 2022, the Federal Court upheld the High Court judgment in the *SRC* case and dismissed Najib's appeals.

[15] On 30 March 2023, the Federal Court by a majority of four to one, dismissed Najib's application to review the Federal Court's judgment pursuant to r 137 of the Rules of the Federal Court 1995.

[16] Najib began serving his imprisonment sentence in the *SRC* case on 23 August 2022, when the Federal Court dismissed his appeal. He has not paid the RM210m fine or any part of it so far.

Audit Report case

[17] On 3 March 2023, Najib was acquitted by the High Court in the *Audit Report* case. On 12 September 2023, the Court of Appeal struck out the prosecution's appeal due to its failure to file an application for an extension of time to file the appeal petition.

Tanore case

[18] In the *Tanore* case, Najib is accused of receiving RM2 billion in illicit funds into his personal bank account from Tanore Finance Corp. The criminal trial in the *Tanore* case, which commenced in August 2019, remains pending before the High Court. As of 5 April 2024, at least 50 witnesses had been called by the prosecution.

[19] The evidence presented by the prosecution's witnesses in the *Tanore* case thus far are incredibly damning of Najib. Evidence has been led, inter alia, that Najib had control over the affairs of 1MDB, and received RM3.634 billion into his personal account. Najib's claims that the monies entering his personal bank accounts were 'Arab donations' are in contradiction with the persecution's witnesses' testimonies that the funds in fact came from Jho Low's proxy, who had stolen them from monies belonging to 1MDB.

[20] Najib's abnormal relationship with Jho Low has also been testified to, by the prosecution's witnesses in the Tanore case. On 13 February 2024, Jasmine Loo, who was General Counsel for 1MDB, testified that Low used his influence as someone close to Najib, and that matters which required Najib's approval needed to be discussed first with Jho Low, and that most in 1MDB viewed Jho Low as a proxy for Najib.

IPIC and money laundering cases

[21] In the *IPIC* case, Najib is accused of misappropriating RM6.6 billion in public funds through payments to IPIC. In the *Money Laundering* case, Najib is accused of accepting proceeds from illegal activities amounting to RM27m. The criminal trial for both the *IPIC* and *Money Laundering* cases have yet to commence.

[22] Accordingly, of the five cases against Najib, he has been convicted in one, acquitted in another, and has three separate ongoing criminal cases before the criminal courts.

Other proceedings

[23] It is information in the public sphere that Najib's corrupt acts in the 1MDB scandal have been the subject of foreign investigations and proceedings since at least 2016.

[24] On 20 July 2016, US Attorney General Loretta E Lynch announced the United States Department of Justice's filing of civil forfeiture complaints seeking the forfeiture and recovery of more than USD1 billion in assets misappropriated from 1MDB. In her announcement of the actions, Attorney General Lynch said that this represented the largest single action ever taken in the United States Government's Kleptocracy Asset Recovery Initiative. In the forfeiture action filed by the Department of Justice, Najib is described as 'Malaysian Official 1' and as having received USD681m of stolen money. On 5 August 2021, the Department of Justice announced that it had repatriated over USD1.2 billion to the people of Malaysia.

[25] The US Government also prosecuted former Goldman Sachs banker Roger Ng in New York for violating US Anti-Bribery Laws and Money Laundering, relating to 1MDB. On 9 March 2023, Roger Ng was convicted by a Federal Court in New York and sentenced to ten years in prison. In Roger Ng's criminal trial, Tim Leissner, a colleague of Roger Ng's in Goldman Sachs, testified on behalf of the prosecution that in order to secure the 1MDB deal for Goldman Sachs, personal favours were given to Najib, such as securing a

placement for Najib's daughter in Goldman Sachs, and that Najib's name appeared in a list of names drawn up by Jho Low of 'targets they had to bribe'.

[26] In addition to the criminal charges against him in Malaysia, Najib is currently facing a civil suit filed by 1MDB (now in control by a new Government) in May 2021 for his involvement in the 1MDB financial scandal, claiming that Najib, as the former chairman of IMDB's Board of Advisers facilitated the entering into sham agreements to facilitate the misappropriation of funds.

[27] In May 2021, SRC itself brought civil claims against Najib for abuse of power and misappropriation of SRC's funds. As testified by Shahrol Azrai Ibrahim Halmi, a former director of SRC and former 1MDB chief executive officer, at the SRC trial, Najib was the 'grand chess master' of the scheme that took place within SRC.

[28] Over in Switzerland, on 2 April 2024 Swiss authorities prosecuted Tareik Obaid and Patrick Mahony for their involvement in the embezzlement of funds in the 1MDB scandal.

[29] It is undeniable that while Jho Low and other individuals were involved in the 1MDB scandal and misappropriation of public funds, none of this would succeed without the knowledge and active assistance of and facilitation by Najib, who was at all material times, the Prime Minister, Finance Minister and Chairman of 1MDB's Board of Advisers. He was undoubtedly the most important, influential and powerful individual in control, in the entire 1MDB saga. He is thus most responsible for the shame that Malaysia has had to endure, and continues to endure, on the world stage because of 1MDB. He is the one who should be held most accountable to Malaysians.

GROUNDS OF JUDICIAL REVIEW

[30] The grounds for seeking the said relief are as follows.

Constitutional Law grounds

[31] The FT Pardons Board's decisions are unconstitutional.

[32] The FT Pardons Board's decisions infringe art 8(1) of the FC, by giving Najib favoured or special treatment that is not equally accorded to other convicted prisoners applying for pardon, in the following circumstances:

(a) there are over 70,000 prisoners jailed in over 30 prisons across Malaysia. At any given point in time, hundreds, if not thousands of pardon

applications are pending before the FT Pardons Board, and the 13 other Pardons Boards of the other States;

(b) the FT Pardons Board usually only meets three or four times a year, and in each sitting only a handful of applications are considered. Equality of treatment (enjoined by art 8(1) of the FC) requires that the FT Pardons Board considers pardon applications in accordance with a fair, equal and logical sequence;

(c) available information does not show that, on 29 January 2024, it had reached Najib's application's normal turn to be considered. Indications are that it was a sitting that accorded Najib with special opportunity and special treatment; over other prisoner-applicants; and

(d) there is a further issue regarding the validity or irregularity of the FT Pardons Board's decisions; in that it was not considering an application for pardon, forgiveness, mercy or clemency (as a pardon-application should be). Rather, Najib's application was one to challenge the outcome of a judicial process (alleging it to be unfair and not accepting its outcome or finality).

[33] The FT Pardons Board's decisions also infringe art 8(2) of the FC, whereby Najib enjoyed positive discrimination by the FT Pardons Board, whereby:

(a) sub-paras [32](a) to (d) are repeated;

(b) he received a reduction of 50% of his imprisonment sentence before even completing one third of his sentence, as applicants are normally and invariably required to do;

(c) he received an RM160m reduction in his RM210m fine, almost effectively extinguishing the mandatory punitive penalty of a fine of not less than five times the sum of the gratification pursuant to s 24 of the Malaysian Anti-Corruption Commission Act 2009;

(d) he received the reduction despite having shown no repentance, remorse or contrition, having never sought forgiveness for his crimes, and with criminal charges against him pending in the *Tanore*, *IPIC* and *Money Laundering* cases, involving illicit funds exceeding RM2 billion; and

(e) where no other person has received such a speedy and favourable reduction in their imprisonment and fines, his distinct and favourable treatment by the FT Pardons Board may only be explained by reason of his being as an ex-Prime Minister of Malaysia and the ex-President of UMNO from 2009 to 2018 and as the first person of such stature to have ever been convicted and sentenced.

Administrative law grounds

[34] In coming to its decisions, the FT Pardons Board' did not consider the matters set out in paras [18] to [33] above, or have such matters and considerations placed before it.

[35] The decisions of the FT Pardons Board', which are the subject of challenge here, are irrational and therefore nullities. The FT Pardons Board had disregarded relevant considerations and took into account irrelevant considerations in coming to its decisions as follows.

Particulars

[36] In reaching the said decisions, the FT Pardons Board disregarded the following relevant considerations:

(a) Najib's actions, for which he was found guilty in the SRC trial and appeals, have brought massive disrepute to Malaysia, damaged investors' confidence and burdened taxpayers with his siphoning of RM42m (and for which no reparation has been made);

(b) Najib has never shown any repentance, remorse or contrition. He has not, in truth, sought pardon, forgiveness, mercy, or clemency. He has not accepted the outcome or finality of the judicial process against him. On the contrary, he has publicly maintained that he was unfairly convicted at all levels levels of the superior courts. He has repeatedly accused the courts of miscarriages of justice;

(c) Najib is still facing criminal charges in the *Tanore*, *IPIC* and *Money Laundering* cases, involving illicit funds exceeding RM2 billion and his actions have forced the taxpayers and the people of Malaysia to incur and continue to pay the debts of 1MDB exceeding RM50 billion;

(d) Najib's conduct had brought massive and worldwide disrepute to Malaysia, not least through the United States Government's widely publicised investigations and enforcement actions involving the 1MDB scandal, with Attorney General Loretta Lynch describing it as the largest kleptocracy forfeiture action taken by the Department of Justice and the Court of Appeal of Malaysia in the SRC case calling it a 'national embarrassment'. Thus, it is irrational to override the legitimate and reasonable expectations of Malaysians that Najib must answer for his actions to the fullest extent, and does not deserve any reprieve;

(e) foreign jurisdictions, and the Malaysian authorities, have and are still seeking to bring to justice those involved in the 1MDB scandal;

(f) Najib had only served 17 months of his 12-year imprisonment (144 months), and had not paid any of the fines imposed in the *SRC* case; and

(g) Najib's application ought not to have been processed and determined on 29 January 2024 in the first place. In the above circumstances, it was irrational (or at least premature and therefore unreasonable), for the FT Pardons Board to have acted in haste and without at least waiting for the outcomes of the other criminal cases against Najib. To the best of the applicant's knowledge, it is unprecedented (as it would be irrational and a mockery) for a reprieve to be given to a convict who is still facing other criminal charges in court.

[37] The FT Pardons Board considered irrelevant considerations; including Najib's core assertion or plea that he had not been given a fair trial and appeal in the *SRC* case, which was the main ground of his petition to the FT Pardons Board.

[38] The FT Pardons Board's decisions are unreasonable in that no reasonable Pardons Board would have made them if it had asked itself the proper questions, considered all relevant considerations and ignored all irrelevant considerations, thereby constituting '*Wednesbury* unreasonableness'. The said decisions are accordingly nullities in law.

[39] The applicant regards the present proceedings as public interest litigation which it is under a statutory duty to commence, as part of its objects and purposes under the LPA, and does not seek costs.

The law

[40] The Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 at p 303; [2012] 4 CLJ 478; [2012] 4 MLRA 257 speaking through Suriyadi Halim Omar FCJ (as he then was) held:

> ... Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[41] The test laid down for leave to commence a judicial review in *WRP Asia Pacific Sdn Bhd* are as follows:

(a) whether the subject matter is amenable to judicial review; and if so

(b) from the materials available, whether the application is frivolous and if not thought as frivolous, to consider that the applicant has an arguable case to obtain the relief sought at the substantive hearing.

[42] The principles governing applications for leave to commence judicial

review proceedings have also been set out in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 at p 69; [2005] 2 MLRA 698; [2006] 1 CLJ 927 where Gopal Sri Ram JCA (as he then was) held:

> [10] ... the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous ... So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable.

[43] It is trite that the applicant will have to satisfy the tests propounded in the abovementioned cases in order to secure the leave to commence the judicial review proceedings. At this stage, the court need not go into merits of the case, but only to see if the subject matter is amenable to judicial review or whether the application for leave is frivolous.

CONTENTION OF PARTIES SENIOR FEDERAL COUNSEL ('SFC')

[44] The Attorney General's Chambers ('AGC') objected to the application on the ground that the subject matter of the application is not justiciable to judicial review.

[45] The learned SFC submitted that the subject matter of this application hinges on the 'high prerogative exercisable' by the YDPA under art 42 of the FC which is a subject matter that is non-justiciable to judicial review.

[46] The learned SFC submitted that the reliefs sought by the applicant is in effect attempting to challenge the prerogative of mercy by the YDPA under art 42 of the FC.

[47] The learned SFC further submitted that the decision of YDPA and the advice of the FT Pardons Board are all part and parcel of one process that culminated with the granting of pardon by the YDPA. Therefore, the entire decision-making process leading to the final decision is also insulated from the judicial review.

[48] The applicant sought an order of prohibition directed against the first respondent from accepting, considering or determining any application by the second respondent for pardon, reprieve or respite until and unless the conditions at para 2(d)(i) to (iii) are satisfied.

[49] The learned SFC submits that the prohibition order by the applicant is akin to an injunction or stay order. The effect of the prohibition order would deprived the first respondent from carrying out its obligation as a public authority under the FC.

THE SECOND PUTATIVE RESPONDENT

[50] The second putative respondent opposed the application on the ground that the applicant has no locus standi to initiate this application when the alleged motion to initiate this application was passed at the applicant's Annual General Meeting ('AGM'), the said meeting did not conform to the provision contained in s 64 of the LPA resulting in a breach of statutory duty and/or ultra vires to the LPA.

[51] The second putative respondent submits that art 42(1) of the FC expressly states it is the power of pardon that is conferred and not a mere duty or function that is conferred on the YDPA.

[52] The YDPA's power of pardons are by necessary and intended implication, discretionary, personal to YDPA when he exercises such function in considering pardon for any particular prisoner. It is clearly a Royal prerogative power, unassailable by any judicial challenges in the court.

[53] The second putative respondent further submits that art 40(1A) of the FC is therefore inapplicable in relation to the YDPA's exercise of his power for pardon as the YDPA cannot be said to be exercising his, said powers when he is bound by the 'advice' of some functionaries of the Government.

[54] According to the second putative respondent, art 40(1A) of the FC deals only with circumstances when the YDPA exercises his functions as opposed to his powers as well.

[55] The second putative respondent submits that the applicant's attempt to differentiate between challenging the advice of the FT Pardons Board and the actual decision of the YPDA is fundamentally flawed, it is non-challengeable.

THE APPLICANT

[56] On the issue of locus standi, the applicant submits that the honourable Attorney General ('AG') had already confirmed in court that the applicant's locus standi is not in dispute.

[57] Therefore, the second putative respondent's submission on this matter ought to be disregarded because:

(a) the second putative respondent cannot usurp the functions and powers that only the AG possesses, at the leave stage;

(b) allowing the second putative respondent to do so will make a mockery of the law, and of the office of the AG;

(c) what was kindly given by this honourable court to the second putative respondent is grace and indulgence; and not locus. Like jurisdiction, locus is a matter of law that cannot be conferred by agreement or by a court, where it is absent; and

(d) it is illogical and cynical for the second putative respondent, who is the one having no locus standi at the leave stage, to abuse the grace and indulgence given to him, by irresponsibly throwing in a supposed 'issue' of locus standi and usurping the role of the AG at the leave stage.

[58] The second putative respondent has by way of the affidavit filed by Muhammad Farhan bin Muhammad Shafee ('Muhammad Farhan') affirmed on the 6 August 2024, challenged the legality of the applicant's AGM on the purported ground that the said AGM allegedly lacked the necessary quorum and consequently the resolution passed by the said AGM to file this leave application to challenge the pardon granted to the second putative respondent is null and void (which is a subject matter outside the scope of enquiry of this judicial review).

[59] It is the applicant's submission that the contents of Muhammad Farhan's affidavit insofar as it refers to the quorum of the AGM of the applicant convened on the 16 March 2024, is substantively and procedurally defective and therefore inadmissible, on the grounds that (based on the records kept by the applicant) the deponent was not present at the said AGM and consequently the allegations made by the deponent therein are mere hearsay.

[60] The applicant submits that if anyone wishes to have the applicant's said AGM invalidated; he or she is required to file a proper action for that purpose. The said AGM is valid, unless otherwise declared by a court. There is certainly no such declaration. No proceeding has even been filed, by anyone, regarding the said AGM.

[61] It is the applicant's submission that the allegation being made by Muhammad Farhan on behalf of the second putative respondent, questioning the lack of quorum and the validity of the said AGM is an attempt to challenge the validity and legality of the said AGM by way of a collateral attack.

[62] The applicant submits that this application raises several important issues of public interest for determination should leave be granted, and they include:

(a) the true construction and effect of art 40(1A) of the FC (which came into force on 24 June 1994);

(b) is the YDPA bound to accept and act in accordance with the advice of the Pardons Board?

(c) does YDPA possess any discretionary power in relation to art 42, in view of art 40(1A) of the FC? and

(d) the extent of the advisory duty or power of the Pardons Board, which is a legal duty or power derived from art 42 of the FC, and whether the decision of the Pardons Board in advising YDPA to grant a pardon is subject to judicial review or nonjusticiable.

[63] Detailed submissions on the law are usually reserved for the hearing of a substantive judicial review. At this leave stage, the applicant would briefly explain the reasons why the line of cases (leading to the notion that pardons decisions are personal and non-justiciable), upon closer scrutiny, were decided sub silentio and per incuriam. This is done to show that the applicant's contentions regarding the justiciability of the exercise of the power to pardon, under the FC, are well-grounded and far from frivolous.

[64] According to the applicant, art 40(1A) of the FC has removed any personal discretion, in the granting of pardons. The YDPA must act according to the advice of a pardons board. Its significance is that art 40(1A) of the FC puts it beyond doubt that the power to grant pardons, under the FC is not a 'prerogative' — for a prerogative can only exist where personal discretion exists.

THE DECISION OF THE COURT

Locus standi

[65] On the issue of locus standi, I take note of the stand taken by the honourable Attorney General ('AG') that the locus standi of the applicant is not in dispute.

[66] Therefore, I agree with the submission of the applicant that the second putative respondent cannot usurp the functions and powers that only the AG possesses, at the leave stage.

[67] I find that the allegation made by Muhammad Farhan on behalf of the second putative respondent, questioning the lack of quorum and the validity of the said AGM is an attempt to challenge the validity and illegality of the said AGM by way of a collateral attack.

[68] It is my view that if second putative respondent wishes to have the applicant's said AGM invalidated, he must file a proper action for that purpose. As it stand now, I find that the said AGM is valid unless otherwise declared by

a court. There is certainly no such declaration. No proceeding has ever been filed by anyone, regarding the said AGM.

[69] I agree with the applicant's submission that in the absence of a proper formal application, this court is not in a position to determine the validity and legality of the said AGM, more so, based on a hearsay affidavit of Muhammad Farhan.

[70] Therefore, I view that the second putative respondent's submission on the issue of locus standi is untenable and devoid of merit and ought to be disregarded.

THE CONCEPT OF JUSTICIABILITY

[71] The AG contended that the subject matter of this application hinges on the 'high prerogative exercisable' by the YDPA under art 42 of the FC which is a subject matter that is non-justiciable to judicial review.

[72] The non-justiciable concept adopted by the Court of Appeal was explained in *Dato' Sri Mohd Najib bin Tun Hj Abdul Razak v Peguam Negara & Ors* [2020] 3 MLJ 114; [2020] 2 CLJ 73; [2020] 1 MLRA 583 as follows:

> [34] The court would commonly refuse to grant leave in cases where the matters are non-justiciable. Gopai Sri Ram (JCA) (as he then was) in the case of *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 at p 67; [2006] 1 CLJ 927 at p 929, had the occasion to state:
>
> Applications for leave under O 53 are made — and they must be made — through a two stage process. The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. *So too will the court be entitled to refuse leave it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg proceedings in Parliament, (paras 5 and 10)*. (Emphasis added.)

[73] Hasnah Hashim JCA (now CJ (Malaya)) in explaining the concept of justiciability, made reference to the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128; [2010] 11 MLRH 277, as follows:

> [35] The issue of justiciability in an application for leave for judicial review was discussed at great length by Mohamad Ariff Md Yusuf J (as he then was) in the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128; [2010] 1 LNS 1390:

A good definition of 'justiciability' can also be found in Chris Finn, The Concept of 'Justiciability' in Administrative Law' in Groves & Lee, *Australian Administrative Law* (2007):

> The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role, (at p 143).

In *Association of Bank Officers v Malayan Commercial Banks* [1990] 3 MLJ 228; [1990] 2 CLJ 734, Ajaib Singh SCJ, speaking for the Supreme Court said this:

> The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

[74] The court in *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra*'s case held that the Regent is intended to be constitutionally vested with all the necessary powers of the Sovereign during the period of incapacitation. The context certainly does not exclude the exercise of powers under art VII of the Laws of the Constitution of Kelantan. Nevertheless, this power is temporary in nature, and exists only during the period of incapacitation of the Sovereign. The subject matter of the present application for leave for judicial review was inherently nonjusticiable. In a matter such as this, the proper forum to resolve the dispute would be the Sultan himself, once His Royal Highness is no longer incapacitated.

[75] The above view of justiciability was recognised by the Federal Court in the case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443; [2019] 3 MLRA 183; [2019] 4 CLJ 561; [2019] 3 AMR 625 where Zawawi Salleh, FCJ (as he then was) emphasized as follows:

> [48] It is trite that not all cases brought before courts are reviewable. Before proceeding to hear a case, a court must first examine, inter alia, its justiciability. 'Justiciability' concerns the limits upon legal issues over which a court can exercise its judicial authority. Non-justiciability in its administrative law sense signifies that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief.

[76] Recently, the Court of Appeal in *Tan Sri Musa bin Hj Aman & Ors v Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors* [2021] 3 MLJ

329; [2021] 3 MLRA 503, had the opportunity to decide whether the act of issuing the proclamation and dissolving the Sabah State Legislative Assembly by the first respondent was justiciable and within the jurisdiction of the High Court for submission, deliberation and eventual decision.

[77] The case is pertaining to an appeal against the decision of the High Court delivered by the learned judicial commissioner (JC) who dismissed the application by the appellants for leave of the judicial review. On 29 July 2020, the second respondent acting as the then Chief Minister of Sabah wrote to the first respondent acting as Yang di-Pertua Negeri (YDPN), requesting the latter to issue a proclamation for the dissolution of the 15th Sabah State Legislative Assembly (SLA). On 30 July 2020, the first respondent agreed to the request and signed and issued the proclamation of the dissolution of SLA ('the proclamation'). On the same date, the proclamation was *gazetted*. The appellants applied at the High Court for leave for judicial review essentially to quash the decision of the first respondent to dissolve the SLA and the proclamation. The JC dismissed the application and hence this appeal.

[78] Abu Bakar Jais JCA (now FCJ) in dismissing the appeal held as follows:

Held, dismissing the appeal:

(1) It was a remiss and too simplistic an approach to just determine that the proclamation and dissolution per se were not justiciable, without looking at the legality of actions done by the first and second respondents prior to the proclamation and dissolution. The legality of the actions leading up to the proclamation and dissolution must be determined. The legality of the proclamation and the dissolution itself must also be decided. Hence, it was inevitable that the learned JC had alluded to the relevant provisions of the Sabah Constitution to determine these matters. It was therefore incorrect for the appellants to submit that this should not be done by learned JC at the leave stage for judicial review. The legality of the two parts was so connected and overlapped each other. Before coming to the decision that the proclamation and dissolution of the SLA was not justiciable, the learned JC had also correctly approached that issue by explaining there were matters that were always not justiciable before the courts.

(2) Even though the provisions of the Sabah Constitution could be argued, litigated and determined for its effect and applicability in relation to this appeal, this still would not assist the appellants in their argument because at the end of the day, *a dissolution of a state assembly was a non-justiciable subject and consequently not amenable for judicial review*.

(3) There were questions and issues in this appeal that could not be simply put aside by saying the same were not justiciable. *However, the proclamation and dissolution of the SLA was not justiciable as explained earlier. Even though the appellants had raised other issues which were justiciable, the core issue remains a non-justiciable subject*.

(4) *The proclamation and dissolution of the SLA should be considered a matter within the executive or legislature's exclusive sphere that should not be encroached by the judiciary. The first, second and the fourth defendants, were the persons and body most suited to decide under what circumstances and timing should the proclamation and dissolution of the SLA should take place. They would be in a much better position compared to the courts in making the call for the end of term for the SLA. The dynamics of politics were within their better grasps than the courts in deciding this*.

(5) *As already pointed out, the issue of the proclamation and dissolution of the SLA in itself could not be justiciable for determination*. And in this regard, the (earned JC was entitled to dismiss the application for judicial review even at the leave stage. (Emphasis added.)

[79] The applicant informed the court that the application (encl 1) seeks to challenge the decision made by the FT Pardons Board when it decided to advise the YDPA to grant Najib the pardon on those terms.

[80] The applicant stressed that it did not seek to challenge the power and duly vested in the YDPA under art 42 of the FC to execute decisions on pardons properly made by the FT Pardon Board.

[81] In essence, the applicant seeks to challenge the decision of the FT Pardons Board and the exercise of its decision making power when it decided to advise the YDPA to grant Najib the pardon on those term.

[82] In this respect, the subject matter to be considered is whether the subject is justiciable.

[83] This approach in looking at the subject matter can be seen in the then Supreme Court case of *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] 1 MLRA 131; [1986] CLJ Rep 256 where Eusoffe Abdoolcader SCJ (as he then was) said as follows:

> [6] ... In relation to the question of the amenability of a prerogative power to judicial review we think that the enlightened approach is that this would be dependent on its nature or subject matter and we find support for this view in the decision of the House of Lords in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374 where Lord Scarman in his speech (at p 407) says that it can be said with confidence the exercise of a prerogative power is subject to review if the subject matter in respect of which it is exercised is justiciable, that is to say, if it is a matter upon which the court can adjudicate, and again in the speech of *Lord Roskill* (at p 418) where he *refers to examples of prerogative powers which he did not think could properly be made the subject of judicial review, such as inter alia that relating to the prerogative of mercy, because their nature and subject matter are such as not to be amenable to the judicial process*. (Emphasis added.)

[84] The Federal Court in *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* states as follows:

> [50] *There are certain areas which the court is reluctant to delve into*. *These include* the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, *the prerogative of mercy*, the dissolution of parliament and the appointment of Ministers. Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the courts. One such instance is the case of *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374*. (Emphasis added.)

[85] Having perused the cause papers, this court is of the view that the relief sought by the applicant is directed at challenging the power of mercy ie royal prerogative of mercy of the YDPA which is expressly preserved by art 42 of the FC.

[86] Therefore, it is apparent that with regard to the subject matter of prerogative power to grant pardon, the present application is not justiciable.

[87] The then Supreme Court in the case of *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; [1985] 1 MLRA 167; [1985] CLJ Rep 293 held:

> [15] ... It is our considered view that the *power of mercy is a high prerogative exercisable by the Yang di-Pertuan Agong* or the Ruler of a State or the Yang di-Pertuan Negeri, as the case may be, *who acts with the greatest conscience and care and without fear of influence from any quarter*.(See *Hanratty and Another v Lord Butier of Saffron Walden*)(1971) 115 Solicitors Journal p 386. (Emphasis added.)

[88] Further, in the case of *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] CLJ Rep 256; [1986] 1 MLRA 131 the then Supreme Court held as follows:

> [6] ... *In relation to the question of the amenability of a prerogative power to judicial review we think that the enlightened approach is that this would he dependent on its nature or subject matter and we find support for this view in the decision of the House of Lords in Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] 1 AC 374 where *Lord Scarman* in his speech (at p 407) *says that it can be said with confidence the exercise of a prerogative power is subject to review if the subject matter in respect of which it is exercised is justiciable, that is to say, if it is a matter upon which the court can adjudicate, and again in the speech of Lord Roskill* (at p 418) where he *refers to examples of prerogative powers which he did not think could properly be made the subject of judicial review, such as inter alia that relating to the prerogative of mercy, because their nature and subject matter are such as not to be amenable to the judicial process*.

A ...

> [8] We would add that Lord Diplock also said (at p 248) that a convicted criminal was not entitled to have disclosed to him any material furnished to the Minister and the Advisory Committee when they are exercising their respective functions under the relevant constitutional provisions in advising the Governor-General in regard to the exercise of the powers of clemency. Article 42 of our Constitution is a reiteration of the prerogative power of mercy exercisable on the advice of the appropriate Pardons Board. *The power of pardon or otherwise to mete out clemency is an executive power, and in our Constitution the royal prerogative of mercy is expressly preserved by art 42 of the Constitution* and is recognised by its inclusion in Chapter 3 of part IV thereof as an executive power [of *Hinds v The Queen* [1977] AC 195 228 (at p 228)]. The Supreme Court of India has also held in *G Krishta Goud & J Bhoomaiah v State of Andra Pradesh & Ors* [1976] 2 SCR 73 76 that *when the Constitution has empowered the nation's highest executive as the repository of the clemency power, the court cannot intervene and judicial review is excluded by implication*. The principle underlying these cases is incisively ingeminated in the judgment of this court in *Sim Kie Chon v Superintended of Pudu Prison & Ors* [1985] 2 MLJ 285; [1985] 1 MLRA 167; [1985] CLJ Rep 293 which effectively disposed of the earlier action commenced by the respondent. (Emphasis added.)

[89] Added to that, the Federal Court in the case of *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529; [2002] 2 MLRA 121; [2002] 4 CLJ 529; [2002] 4 AMR 4785 held as follows:

> [15] In stating that *the power under art 42 of the Federal Constitution is not susceptible or amenable to Judicial review, our Supreme Court was then relying on Civil Service Unions*. *Our Supreme Court and the House of Lords in Civil Service Unions had referred to this power under art 42 as the prerogative of mercy*. And as pointed out to us by the learned defendants' counsel in the excerpt of Lord Roskill (quoted above) *the prerogative of mercy is amongst the powers* that Lord Roskill thought *not to be susceptible to judicial review because its nature and subject matter is such as not to be amenable to the judicial process.*(Emphasis added.)

(See also: *Datuk Seri Anwar Ibrahim v Mohd Khairul Azam Abdul Aziz and another appeal* [2023] 2 MLJ 545; [2023] 3 MLRA 149; [2023] 2 CLJ 236.)

[90] In this present case, I find that prerogative of mercy pursuant to art 42 of the FC is the direct exercise of YDPA's sole discretion and not the FT Pardons Board or power delegated to the FT Pardons Board.

[91] Given the above, this court is of the considered view that the prerogative of mercy pursuant to art 42 of the FC is not susceptible to judicial review. Hence, the reliefs sought to challenge the decision of the FT Pardons Board are by its nature and subject matter, not justiciable to judicial review.

[92] The applicant argues that it is not challenging the prerogative of the YDPA but instead focusing its challenge on the advice provided by the FT Pardons Board. In essence, the applicant is splitting the decision of the YDPA and the advice from the Pardons Board.

[93] I am of the considered view that the applicant's attempt to differentiate between challenging the advice of the Pardons Board and the actual decision of the YDPA is flawed, it is non-challengeable.

[94] In regards to the applicant's contention, I would like to refer to a Federal Court's case of *Juraimi bin Husin v Pardons Board, State of Pahang & Ors*. In this case, the plaintiff, together with two others, had been convicted for murder and sentenced to death by the High Court at Temerloh. His appeal to the Court of Appeal and the Federal Court had been dismissed. On 30 June 1999, he petitioned for clemency to the Sultan of Pahang. His petition was rejected on 4 April 2001. By way of an originating summons filed in the High Court at Kuala Lumpur, the plaintiff applied for several declaratory orders pertaining to the rejection of the clemency petition. Meanwhile, the defendants applied under O 18 r 19 of the Rules of the High Court 1980 for the originating summons to be dismissed on the ground that the decision of the Pardons Board was not justiciable. During the hearing of the defendants' application, the plaintiffs counsel urged the court to remit the matter to the Federal Court under s 84 of the Courts of Judicature Act 1964 ('the CJA') for the Federal Court to decide on the constitutional issues raised. The High Court, however, dismissed the defendant's application. On appeal to the Court of Appeal, the Court of Appeal allowed the plaintiff's appeal and ordered the hearing of the originating summons in the High Court to be stayed and directed the High Court to remit to the Federal Court the question of whether the decision making process of the decision by the Sultan of Pahang under art 15 of the Laws of the Constitution of Pahang, read together with art 42 of the FC, was justiciable. Counsel for the plaintiff stated that although there could be no judicial review or justiciability of the decision of the Pardons Board on the merits, the decision making process resorted to by the Board could be examined to consider whether it was in line with the spirit of the relevant constitutional provisions. According to counsel for the plaintiff, the inordinate delay between the presentation of the clemency petition and the decision making process leading to the rejection of the said petition amounted to a contravention of arts 5(1), 42(4)(b) and (8) and s 38 in the 11th Schedule of the FC.

[95] Ahmad Fairuz CJ (Malaya) (as he then was) held as follows:

> [16] ... The High Court, after referring to several authorities which include the case of *Sim Kie Chon v Superintendent of Pudu Prison* and the *Civil Service Unions* case held that, at p 67 (of Karpal Singh):

A

> Basically, *the originating summons relates, at least indirectly,* if not directly, *to an issue concerning the process of clemency which* is *clearly non-justiciable*. (Emphasis added.)

> [17] The High Court then proceeded to hold the issue raised in the originating summons is not justiciable.

B

> [18] In the light of the above mentioned authorities, we find it difficult to agree with the Indian authorities referred to in this judgment and by the plaintiff. *To us, the effect of making the decision making process justiciable would, in the final analysis, make the decision itself to be held null and void. This would have the same effect as having the decision itself justiciable. Consequently, we are of the view that any attempt to make the decision making process justiciable would indirectly make the decision itself justiciable. Hence we answered the first question in the negative*. (Emphasis added.)

C

[96] Further, the Court of Appeal in the case of *Tan Sri Musa bin Hj Aman* held:

D

> [78] Further, if a matter is found to be not justiciable, the decision-making process leading to the non-justiciable matter should also be not justiciable ...

E

(See also: *Syed Iskandar Syed Jaafar v Dato' Sri Ismail Sabri Yaakob & Ors* [2002] 4 MLJ 529; [2023] 2 MLRH 300; [2023] 1 CLJ 309.)

[97] Therefore, it can be inferred from the above cases that if a matter is found to be not justiciable, the decision-making process leading to the non-justiciable matter should also be not justiciable.

F

[98] I am of the considered view that the decision of the YDPA and the advice of the FT Pardons Board are all part and parcel of one process that culminated with the granting of pardon by the YDPA, consequently not a matter that is suitable and appropriate to be reviewed before the court.

G

[99] The applicant further argued that the power of pardon is statute-based and exercised by the Pardons Board is justiciable to judicial review.

H

[100] According to the applicant, in light of art 40(1A) of the FC, all powers of YDPA (including the power to grant pardons) must be exercised in accordance with the advice of the appropriate person or body of persons and YDPA shall accept such advice.

I

[101] The applicant further submits that art 40(1A) of the FC has removed any personal discretion in granting of pardons that is to say YDPA must act according to the advice of a Pardons Board.

[102] I am of the considered view that the reliance to art 40(1A) of the FC to support the applicant's contention that this application is justiciable is devoid of merit. I find that art 40(1A) of the FC only applied in the situation when it is provided under the Constitution or the Federal laws that the YDPA is to act on the advice.

[103] I find support for my view by referring to the proviso to art 40(2) of the FC which provides that the YDPA may act at his discretion in the performance of the functions 'in any other case mentioned in this Constitution':

> 40(2) Yang di-Pertuan Agong to act on advice
>
> The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:
>
> (a) The appointment of a Prime Minister;
>
> (b) The withholding of consent to a request for the dissolution of Parliament;
>
> (c) The requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting, *and in any other case mentioned in this Constitution*.(Emphasis added.)

[104] Reading art 40(2) together with art 42 of the FC, it is clear that the power of pardon is a decision specifically entrusted to the sole discretion of YDPA. Therefore, the final and conclusive determination rest with the YDPA and not the Pardons Board.

[105] Given the above, the authorities cited on the exercise of YDPA's power of clemency under art 42 of the FC that is not susceptible of judicial review are well established. Hence, there is no reason for this court to depart from the established binding precedents.

[106] Therefore, it is the considered view of this court that if the decision of YDPA to grant pardon is not susceptible to judicial review, it follows that the process leading to it is also not susceptible to judicial review.

CONCLUSION

[107] Therefore, for the above reasons, I am of the considered view that this leave application is non-justiciable, frivolous and more importantly, there is no arguable case that granting the reliefs sought at the substantive hearing may be the resultant outcome.

[108] Since my decision is based on the above ground ie non-justiciability, I

A will not address the remaining PO raised by the AG.

[109] Based on the above reasons, this application for leave ought to be dismissed with no order as to costs.

B *Convictions and sentences by sessions court affirmed.*

Reported by Nabilah Syahida Abdullah Salleh

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